

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2122 B

IN THE UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CALVIN RONALD DeVYVER,
Petitioner-Appellant

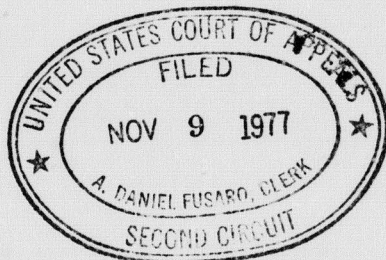
v.

UNITED STATES OF AMERICA,
Respondent-Appellee

COURT OF APPEALS CIVIL DOCKET No. 77-2122

APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT
CIVIL DOCKET No. 75-181

BRIEF OF THE APPELLANT



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STATEMENT OF THE CASE

On August 10, 1973 appellant Calvin R. deVyver was sentenced to a term of three years and six months imprisonment for using false identification to purchase ammunition contrary to 18 U.S.C. Section 922(a)(6). On July 28, 1975 appellant moved to vacate and set aside the conviction and sentence, and the United States District Court for the District of Vermont granted the motion on January 6, 1976.

As a result of a subsequent plea and judgment of guilty to the same charge, the Court sentenced appellant on May 7, 1976 to a term of three years and six months imprisonment, suspended, and probation for a period of two years. Petitioner is currently in the custody of the United States Probation Officer in service of that sentence.

On July 13, 1977 appellant moved to vacate and set aside the conviction and judgment pursuant to 28 U.S.C. Section 2255 on the ground that the United States Attorney broke a plea bargain at the time of sentencing.

The District Court denied the motion September 6, 1977, and appellant is appealing that order.

ARGUMENT I

BREAKING OF PLEA BARGAIN BY PROSECUTOR IS VIOLATIVE OF APPELLANT'S CONSTITUTIONAL SAFEGUARDS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In this case the appellant pleaded not guilty to a five count indictment. Appellant and his defense counsel subsequently entered into a plea bargain that the petitioner would enter a plea of guilty to one count if the prosecutor dropped the other four counts and if the prosecutor refrained from making any remarks at the time of sentencing. The prosecutor's agreement not to make any remarks at sentencing was a critical part of the plea bargain as far as petitioner was concerned because he felt that the prosecutor's remarks at an earlier voided sentencing had been highly inflammatory.

Appellant's understanding of the plea agreement was set forth on the standard document, Petition to Enter Plea of Guilty and Order Entering Plea. Appellant set forth in his handwriting:

11. "U.S. Attorney will make no statements at time of sentencing." (see Appendix)

Appellant's understanding was again unequivocally set forth in the following exchange with the Court on the record at the time of the change of plea:

"THE COURT: Now have any threats or promises been made to persuade you to enter a plea of guilty in this case?

MR. DeVyver: Just that it's my understanding that the Counts II through Count V would be withdrawn and that the U.S. Attorney would make no statements at the time of sentencing." (see Appendix, Change of Plea Transcript, pages 9, 10) (emphasis added)

The following exchanges took place between the Court and appellant's attorney and the Assistant U.S. Attorney:

"THE COURT: Mr. West, what is your understanding of the,

--any discussions you may have had with the United States Attorney in this case?

MR. WEST: Well the same as indicated by Mr. DeVyver, Your Honor, that Counts II through Count V will be withdrawn and at the time of sentencing the United States Attorney will make no statements regarding sentence.

THE COURT: Is that the limit, Mr. Hughes?

MR. HUGHES: Yes it is, Your Honor, the remaining four counts will be dismissed under Rule 48-A, at the time of sentencing and we will make no statements at the time of sentence. (see Appendix, Change of Plea Transcript, page 11) (emphasis added)

The Assistant U.S. Attorney, Mr. Hughes, himself, categorically stated, therefore, at the time of the change of plea that the Government would make "no statements at the time of sentence". If he had said anything else, appellant and his attorney would have objected, as we did when the United States Attorney, Mr. Cook, started to say something at sentencing.

At the time of sentencing, when the Court started to ask the United States Attorney if he wished to say anything, the following exchange took place:

"THE COURT: Mr. COOK, is there anything that you have to,--

MR. COOK: Mr. WEST has told me, I would have said something briefly but Mr. WEST has told me that he had a plea bargain with Mr. HUGHES who handled this case at the time of the plea that the Government would not say anything at sentencing. Usually, our usual - I'd like to be sure that I am right, Mr. West, usually, if we get into this position at all we make the agreement that we do not make any recommendations in sentencing but we do not usually agree we will not say anything. Am I correct?

MR. WEST: That's correct, but it is on the record." (see Appendix, Sentencing Transcript, page 5) (emphasis added)

Despite appellant's attorney's timely objection, the Court permitted the U.S. Attorney to make a statement, contrary to the understanding with the Assistant U.S. Attorney:

"THE COURT: If there is anything you have to say the Court will hear it.

MR. COOK: The only thing I wish to say, the Government does consider this a serious matter and it is a part of a serious episode. We have no recommendation, Your Honor, but we did consider this a serious case, much more serious than Mr. WEST has represented." (see Appendix, Sentencing Transcript, page 5)

The rule governing this case was definitively set forth in Santobello v. New York, 404 U.S. 257, 30 L. Ed2d427, 92 S. Ct. 495 (1971). The facts of Santobello were completely analagous with the facts in the instant case. In Santobello the prosecutor agreed not to make any remarks at sentencing, but when the sentencing date arrived another prosecutor appeared and, over the objections of defense counsel, was permitted to make remarks.

For the Court Mr. Chief Justice Berger stated,

"This record represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may well explain these episodes, but it does not excuse them. The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice." (emphasis added) Id. at 260.

The Court continued,

"The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known.

"This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. These circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." (emphasis added) Id. at 261-262.

In vacating the judgment the Court concluded,

"On this record, petitioner 'bargained' and negotiated for a particular plea in order to secure dismissal of more serious charges, but also on

condition that no sentence recommendation would be made by the prosecutor. It is now conceded that the promise to abstain from a recommendation was made, and at this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial. The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the breach of agreement was inadvertent does not lessen its impact." (emphasis added) Id. at 262.

It was inexcusable that in this case "the left hand did not know what the right hand is doing". The sentence was, therefore, imposed in violation of the Constitution and laws of the United States in view of Santobello, supra, in that the court was without jurisdiction to impose the sentence for the reason that at the time of the entry of plea the Assistant United States Attorney, as part of the plea bargain entered into, promised to make no remarks or recommendations at the time of sentencing, but the United States Attorney broke this agreement at the time of sentencing and made remarks and recommendations to the court regarding the appellant. As a result of the foregoing, appellant submits that his plea was neither voluntary nor intelligently entered, and that, accordingly, the plea was constitutionally unacceptable and that the sentence and judgment must be vacated.

ARGUMENT II

APPELLANT'S REASONABLE INTERPRETATION OF THE PLEA AGREEMENT IS CONTROLLING, AND, IF APPELLANT'S UNDERSTANDING OF THE PLEA AGREEMENT IS VIOLATED, THE JUDGMENT MUST BE SET ASIDE.

It is difficult to imagine how any statement could be more clear than appellant's statement of his understanding of the plea agreement in the document, Petition to Enter Plea of Guilty and Order Entering Plea:

11. "U.S. Attorney will make no statements at time of sentencing." (see Appendix) (emphasis added)

The Assistant United States Attorney, having found himself in a classic case of not "letting the left hand know what the right hand is doing" (Santobello v. New York, supra), now attempts to explain the United States Attorney's inflammatory remarks at sentencing away by alleging that he had reserved the right to comment on the facts at sentencing. He suggests that defense counsel acknowledged this interpretation at the time of the change of plea in the following exchange:

"THE COURT: Mr. West, what is your understanding of the, --any discussions you may have had with the United States Attorney in this case?

MR. WEST: Well the same as indicated by Mr. DeVyver, Your Honor, that Counts II through Count V will be withdrawn and at the time of sentencing the United States Attorney will make no statements regarding sentence. (see Appendix, Change of Plea Transcript, page 11) (emphasis added)

The Assistant United States Attorney attempts to take two words appellant's attorney spoke at the change of plea out of context and use them as authorization for the United States Attorney's remarks at sentencing. Defense counsel's remark was intended as nothing more than agreement with appellant's two statements, one written and one verbal, and the prosecutor's own statement

that the prosecutor would make no statements at the time of sentence.

As noted previously, the exchange between the court and defense counsel was followed by the exchange between the court and the prosecutor:

"THE COURT: Is that the limit, Mr. Hughes?

MR. HUGHES: Yes it is, Your Honor, the remaining four counts will be dismissed under Rule 48-A, at the time of sentencing and we will make no statements at the time of sentence. (see Appendix, Change of Plea Transcript, page 11) (emphasis added)

Only a minute before, the following exchange had occurred:

"THE COURT: Now have any threats or promises been made to persuade you to enter a plea of guilty in this case?

MR. DeVyver: Just that it's my understanding that the Counts II through Count V would be withdrawn and that the U.S. Attorney would make no statements at the time of sentencing." (see Appendix, Change of Plea Transcript, pages 9, 10) (emphasis added)

Not only did the prosecutor not disagree with what the appellant had just written and stated, he agreed completely. If the prosecutor had said anything else, appellant and his attorney would have objected, as we did when the United States Attorney, Mr. Cook, started to say something at sentencing.

The Court started to ask:

"THE COURT: Mr. COOK, is there anything that you have to,--"
The pause and Mr. Cook's response resulted from defense counsel at that moment approaching Mr. Cook off the record and reminding him of the plea agreement and objecting to his making any statement:

"MR. COOK: Mr. WEST has told me, I would have said something briefly but Mr. WEST has told me that he had a plea bargain with Mr. HUGHES who handled this case at the time of the plea that the Government would not say anything at sentencing. Usually, our usual - I'd like to be sure that I am right, Mr. West, usually, if

we get into this position at all we make the agreement that we do not make any recommendations in sentencing but we do not usually agree we will not say anything. Am I correct?

MR. WEST: That's correct, but it is on the record." (see Appendix, Sentencing Transcript, page 5) (emphasis added)

It is clear from the record that appellant made timely objection to the United States Attorney's remarks; to have made further objection at that time would not only have been futile but would have chanced aggravating the prosecutor and court at the time of sentencing, the most sensitive time in criminal proceedings for a defendant, exactly what appellant and his attorney had been seeking to avoid by obtaining the Assistant United States Attorney's agreement not to say anything at sentencing in the first place. Appellant was then faced at sentencing with the United States Attorney, who had not been informed of the plea agreement by his Assistant, and made his objection known, but, necessarily, as tactfully as possible.

The United States Attorney then went on to make an inflammatory, subjective characterization of the case (see Appendix, Sentencing Transcript, page 5). Petitioner and his attorney cannot say what the Government usually does or does not do at Sentencing. Petitioner and his attorney do know what the Government agreed not to do on this occasion, however. This had been a very lengthy, complicated case, with various stages taking place over extended periods of time. It was in this context that, as the Assistant United States Attorney himself stated, that he would make "no statements at the time of sentence."

In any event, the content of a plea bargain must be determined by considering what the defendant might have reasonably interpreted it to be rather than the prosecutor's subjective understanding. In Commonwealth v. Alvarado, Pa., 276 A. 2d 526 (1971), the prosecutor agreed not to seek the death penalty in exchange for a guilty plea but then went on to make an inflammatory statement at sentencing. In vacating the death sentence, the Pennsylvania Supreme Court stated:

"It is of course possible that the prosecutor may have intended to promise only that he would not explicitly urge the death penalty. However, the prosecutor's subjective understanding of his promise is immaterial. To determine the content of a plea bargain we must consider what the defendant might have reasonably interpreted it to be. (citations omitted) Here, Alvarado might have reasonably believed that the prosecutor's promise not to seek the death penalty included a commitment not to make any damning or even potentially damaging statements at the time of sentencing. As so interpreted, that promise was clearly violated." Id at 529.

In the instant case examination of the entire record indicates that the appellant reasonably believed the Assistant United States Attorney's statement that he would make "no statements at the time of sentence."

ARGUMENT III

THE JUDGMENT SHOULD BE STRICKEN AND THE APPELLANT PERMITTED TO WITHDRAW HIS PLEA OF GUILTY.

In vacating the judgment in Santobello v. New York, supra, Mr. Chief Justice Burger ruled for a unanimous Court of seven. He indicated that on remand the state court should determine if "the circumstances require granting...the opportunity to withdraw his plea of guilty" or "whether the circumstances require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge." Santobello v. New York, 404 U.S. 257 at 263.

A majority of the Court believed that in cases like this, when the defendant seeks to vacate the plea, that relief should generally be granted. Mr. Justice Marshall stated:

"At least where the government itself has broken the plea bargain, this disappointment cannot bar petitioner from withdrawing his guilty plea and reclaiming his right to a trial.

"I would remand the case with instructions that the plea be vacated and petitioner be given an opportunity to replead to the original charges in the indictment." Id. at 269.

In a concurring opinion Mr. Justice Douglas stated:

"The lower courts, however, have uniformly held that a prisoner is entitled to some form of relief when he shows that the prosecutor reneged on his sentencing agreement made in connection with a plea bargain, most jurisdictions preferring vacation of the plea on the ground of 'involuntariness,' while a few permit only specific enforcement. Note: Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U Pa L Rev 865, 876 (1964). As one author has stated, the basis for outright vacation is 'an outraged sense of fairness' when a prosecutor breaches his promise in connection with sentencing. D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 36 (1966)." (404 US 257, 266, supra).

"Where the 'plea bargain' is not kept by the prosecutor, the sentence must be vacated and the state court

will decide in light of the circumstances of each case whether due process requires (a) that there be specific performance of the plea bargain or (b) that the defendant be given the option to go to trial on the original charges. One alternative may do justice in one case, and the other in a different case. In choosing a remedy, however, a court ought to accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State." (emphasis added) (404 U.S. 257, 266-267)

Review of the many cases following Santobello reveal that the courts have, indeed, given the "defendant's preference considerable, if not controlling, weight".

In vacating a District Court conviction and dismissing an indictment in U.S. v. Garcia, 519 F. 2d 1343, 1345 (9th Cir. 1975), the court ruled:

"In Santobello, the Supreme Court held that when a prosecutor makes a promise which serves as consideration or inducement for a guilty plea, the promise must be fulfilled. 404 U.S. at 262, 92 S. Ct. 495. More broadly, our court has written that '...when the prosecution makes a "deal" within its authority and the defendant relies on it in good faith, the court will not let the defendant be prejudiced as a result of that reliance.' United States v. Goodrich, 493 F. 2d 390, 393 (9th Cir. 1974)."

Among the most recent cases following Santobello is Palermo v. Warden, Green Haven State Prison, 545 F. 2d/²⁸⁶(2d Cir. 1976). In affirming relief granted by the District Court, Judges Meskill and Waterman stated:

"Santobello v. New York, supra, 404 U.S. at 262, 92 S. Ct. at 499, established that 'when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.' Resting on principles of fairness in securing such an agreement and the adjudicative element inherent in accepting a plea, Santobello focussed on an 'appropriate recognition of the duties of the prosecutor in relation to promises made' in plea negotiations. Id. Neither the inadvertence of the breach nor its possibly harmless effect obviated the need for remand to the state court for appropriate relief.

"Clearly, then, Santobello requires relief when the prosecutor fails to fulfill promises within his power made in negotiating a plea bargain." Id. at 295-296.

The view of the majority in Santobello reveals, therefore, that the judgment not only should be stricken but that the appellant should be given the opportunity to withdraw his plea of guilty as well.

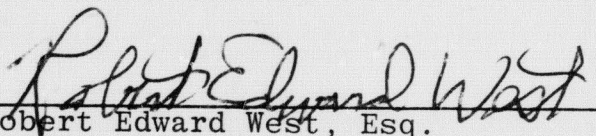
CONCLUSION

For the reasons stated above, the appellant, Calvin R. deVyver, respectfully requests that the order of the United States District Court for the District of Vermont denying his motion to vacate and set aside the conviction and judgment be reversed and that the judgment and plea of guilty be stricken.

Respectfully submitted,

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